U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 19 September 2002

Case No.: 2001-STA-0033

In the Matter of:

RONALD N. SCHWARTZ,
Complainant

v.

YOUNG'S COMMERCIAL TRANSFER, INC.,
Employer

Appearances:

Ronald N. Schwartz, Pro Se
Complainant

Scott Daniel, General Manager
Young's Commercial Transfer, Inc.
Respondent

Before: Robert L. Hillyard
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This proceeding arises under the employee protection provision of the Surface Transportation Assistance Act of 1982, 49 U.S.C. § 31105, and the regulations promulgated thereunder, 29 C.F.R. Part 1978 ("STAA" or "the Act").

Pursuant to § 31105 of the Surface Transportation Assistance Act of 1982 (49 U.S.C. § 31105), Ronald Schwartz filed a complaint with the Secretary of Labor alleging that Young's Commercial Transfer ("Young's") discharged him for not driving a truck when he was too tired to drive safely, thereby discriminating against him in violation of the Act. Following an investigation, the Secretary of Labor, acting through her agent, the Regional Administrator for the Occupational Safety and Health Administration, dismissed the complaint on March 1, 2001, finding no reasonable cause to believe a violation had occurred. The Complainant filed objections to the Regional Administrator's decision on March 21, 2001.

A formal hearing was held in Fresno, California, on February 26, 2002, where the parties were afforded full opportunity to present evidence and argument. The Complainant testified in his

own behalf. The Respondent presented the testimony of General Manager Scott Daniel and Welder/Dispatcher Joseph Duncan.

ISSUES

1. Whether Ronald Schwartz was engaged in protected activity.

2. If the above is answered yes, whether the Respondent took adverse action against the Complainant in retaliation for his protected activities, in violation of the Act.

FINDINGS OF FACT

Ronald Schwartz is a certified commercial driver with a Class A license with a doubles endorsement (two trailers) (Tr. 10, 14). Young's is engaged in intrastate trucking operations and is an employer subject to the Surface Transportation Assistance Act, 49 U.S.C. § 31105. Young's has been in business since 1935, and has been specializing in transporting tomatoes for the last forty-four years. Eighty percent of its business is transporting tomatoes from the field to the first point of processing, which is a cannery, primarily in the summertime from the months of June through October (Tr. 34).[1]

Schwartz responded to an ad in the Fresno Bee approximately six weeks before the start of work. He was hired on or about June 29, 2000, as a driver of a motor vehicle with gross weight of over 10,000 pounds (Tr. 10, 14). The job was a seasonal job, hauling tomatoes from the first part of July until the end of October. It involved driving a tractor with empty trailers from the dispatch office to the field, unhitching the empty trailers, hitching up to loaded trailers, returning to the processing plant, going through a grading process, unhitching the loaded trailers, getting empty trailers, going back to dispatch and making another run (Tr. 12-13). His runs were from Helm, California, to a location near Bakersfield, California, approximately 240 miles round trip (Tr. 13). The driver was to make two runs per night, starting at 6:00 p.m. and ending at 6:00 a.m. the following morning. He was to be paid $65.00 per run (Tr. 16). Schwartz was employed by Young's for approximately one week, from June 29, 2000 to July 6, 2000 (Tr. 10). His last runs were on July 4-5.[2] He was paid for the runs that he made (Tr. 17).

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[1] Tr. refers to the transcript of the hearing; CX refers to the Complainant's Exhibits; and, RX refers to the Respondent's Exhibits.

[2] When making two runs, he would begin at 6:00 p.m. and end at 6:00 a.m. the following day.

Scott Daniel has been the general manager of Young's Commercial Transfer for three years (Tr. 35). His duties include recruiting, hiring, and training all drivers for the summer seasons (Tr. 34). He came into contact with the Complainant during the hiring process of summer 2000 (Tr. 35). Schwartz responded to an advertisement in the Fresno Bee, the local newspaper, and Daniel sent him an application. Schwartz was given a driving test, a requirement of the Department of Transportation. There is no ranking of drivers by ability but only a pass or fail (Tr. 36). Daniel decided whether Schwartz was assigned to day or night shift. Joseph Duncan has worked as a welder/dispatcher at Young's for four years. He called Schwartz on June 28, 2000, to inform him he was assigned to the night crew (Tr. 38, 45). Schwartz stated that he was led to believe by Moe, the day dispatcher, that he would be given the day shift, although he wasn't promised the day shift (Tr. 24-27).

A new employee orientation took place on June 14, 2000, when Daniel explained how the summer season worked. He explained that a twelve-hour shift was required, that the pay was per-load, and that early on, each driver would get two loads a night and up to six a night by the end of the season (Tr. 37). Daniel explained that they may never get a day off in the summer due to the nature of the tomato cannery business, and that they needed to work with their dispatchers for days off (Tr. 38). Schwartz attended the company orientation and understood exactly what the company wanted as "it was clearly laid out to me" (Tr. 25-26, 36-37).

Daniel said that each driver was offered at least two runs a night because more runs were available than Young's could cover with their own trucks at two runs per night (Tr. 38, 41). When a driver only does one run, Young's has to call an independent owner/operator (sub-hauler) to do the other run. Young's must pay the independent driver more than one of its drivers, so, overall, it costs the Company more money when an employee makes only one run.

On June 29, 2000, his first night on the job, Schwartz was too tired to complete both runs. On that night, Schwartz and a couple other drivers made only one run (Tr. 46).[3] This was acceptable to the Respondent, who sent Schwartz home to rest (Tr. 39). All drivers were offered two runs that night. On June 30, 2000, Schwartz was again too tired to complete both runs. Joseph Duncan, the dispatcher, told Schwartz that he was needed for all twelve hours, but that if he was unable to do both runs, he could go home.

[3] Schwartz claims that he was not always offered two loads per night (Tr. 29). I place more weight on the testimony of Young's witnesses who said that they had more runs than they could handle and had to pay more for sub-haulers to complete the runs.

Again, on July 1, 2000, Schwartz made only one run and Duncan stressed that it cost Young's more money when drivers only made one run (Tr. 47). Duncan again stressed to the Complainant the importance of working a whole twelve-hour shift and his failure to do so was causing a hardship to the Company. On July 2, 2000, Schwartz completed two runs for the first time (Tr. 48). On July 3, Schwartz could only make one run, saying he was worked too hard the day before. Again, Duncan reminded Schwartz of the importance of drivers making two runs and that other drivers were making both runs each night. On July 4, Schwartz said he could only do one run and Duncan told him he needed two runs. Schwartz made both loads that night, after taking a twenty-five minute break between runs. Duncan said that the Company had no problem with Schwartz taking a break (Tr. 40). On July 5, Schwartz called the dispatcher and said he was tired and could make only one run because he worked a full shift the night before (Tr. 20). The dispatcher called Daniel to ask him what to do and was told to tell Schwartz to stay home because it was easier to get a sub-hauler for both loads. The Company decided to call in a sub-hauler for July 5. Daniel spoke with dispatchers on July 6, 2000, about Schwartz' job performance and decided he should be terminated because he had not been able to get the job done in the six or seven days he had worked for them (Tr. 40). Later that day, Daniel called Schwartz and told him that he was fired (CX 1; Tr. 19).

Schwartz had previously worked in the tomato industry (Tr. 23). In 1999, he worked for Frank Perez and Sons in Walnut Grove, where he worked the day shift for the full three-month tomato season (Tr. 24). He worked the night shift for Morning Star in 1998, and was fired after one month over allegations of sexual harassment (Id.).

CONCLUSIONS OF LAW

The Surface Transportation Assistance Act provides:

> (1) A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment, because–
>
> (A) The employee, or another person at the employee's request has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety regulation, standard, or order, or has testified or will testify in such a proceeding; or,
>
> (B) The employee refuses to operate a vehicle because–

(i) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health; or

(ii) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition.

(2) Under paragraph (1)(B)(ii) of this subsection, an employee's apprehension of serious injury is reasonable only if a reasonable individual in the circumstances then confronting the employee would conclude that the unsafe condition establishes a real danger of accident, injury, or serious impairment to health. To qualify for protection, the employee must have sought from the employer, and been unable to obtain, correction of the unsafe condition.

In order to bring a claim under the STAA, a complainant must first make out a prima facie case showing discriminatory treatment. To make such a case, a complainant must prove: (1) that he was engaged in an activity that is protected by the Act; (2) that he was the subject of adverse employment action; and, (3) that a causal link exists between his protected activity and the adverse action of his employer. Moon v. Transport Drivers, Inc., 836 F.2d 226, 229 (6th Cir. 1987). By establishing a prima facie case, the complainant creates an inference that the protected activity was the likely reason for the adverse action. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

Once a prima facie case has been established, the Respondent then has the opportunity to rebut an inference of discrimination by presenting evidence of a nondiscriminatory justification for the adverse employment action. Carroll v. J.B. Hunt Transportation, 91-STA-17 (Sec'y June 23, 1992). The Respondent does not need to prove a nondiscriminatory justification; they must merely articulate one by presenting evidence of the legitimate reason. St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993).

If the respondent employer does present evidence of a nondiscriminatory motive for the adverse employment action, the complainant must then prove, by a preponderance of the evidence, that the legitimate reason articulated by the employer was merely a pretext for discrimination. Moon, supra; See also, Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981). To show that the justification was merely pretextual, the complainant must do more than simply show that the reason articulated by the respondent was not the true reason for termination. The complainant must prove both that the asserted reason is false and that discrimination was the true reason for the adverse action. Hicks, supra, at 2752-56. The complainant,

> ... may demonstrate that the reasons given were a pretext for discriminatory treatment by showing that discrimination was more likely the motivating factor or by showing that the proffered explanation is not worthy of credence. In order to determine that [the complainant] has established discriminatory intent in regard to this adverse action by the [respondent], however, '[i]t is not enough ... to disbelieve the employer; the fact finder must believe the plaintiff's explanation of intentional discrimination.'

St. Mary's Honor Center, 113 S.Ct. at 2749, 2754, 125 L.Ed. 2d at 424.

When an employer offers a nondiscriminatory justification for an adverse employment action, the next step is to decide whether the employer's reason is pretextual. Instead of deciding whether a prima facie case has been made out, "the relevant inquiry is whether [the complainant] established, by a preponderance of the evidence, that the reason for his discharge was his protected safety complaints." Pike v. Public Storage Companies, Inc., ARB No. 99-072, ALJ No. 1998-STA-35 (ARB Aug. 10, 1999) (citing Frechin v. Yellow Freight Systems, Inc., ARB Case No. 97-147, ALJ Case No. 96-STA-34, Final Dec. and Ord., Jan. 13, 1998, slip op. at 1).

Prima Facie Case

There is no dispute that Schwartz was terminated (an adverse employment action) and that the reason for termination was his refusal to take the proposed assignments. The only element of the prima facie case left to examine is protected activity. Schwartz must prove that he was engaged in an activity protected by the Act when he refused to drive two runs. Refusing to drive can generally be determined protected activity under two provisions of the Act: when operation of the vehicle violates a federal regulation (STAA § 31105(a)(1)(B)(i)), or because the employee has a reasonable apprehension of serious injury because of the unsafe condition of the vehicle (STAA § 31105(a)(1) (B)(ii)).

I find that Complainant Schwartz was not engaged in protected activity. A complainant must prove the elements of a prima facie case by a preponderance of the evidence. Greathouse v. Greyhound Lines, Inc., 92-STA-18 (Sec'y Dec. 15, 1992), slip op. at 2, citing Auman v. Inter Coastal Trucking, 91-STA-32 (Sec'y July 24, 1992), slip op. at 2. Schwartz has failed to meet his burden of proving he was engaged in protected activity. The Complainant states that he never failed to do the assigned work. He said he completed two runs when offered but was offered multiple runs only on July 2 and July 4, and on both of those nights he completed two runs. Schwartz testified:

> As the week progressed, the company did offer two runs, and I accepted them when they were offered, with the exception of the one day that I called to say that I didn't feel safe for two. But I offered one. So of everything that was asked of me by this company in a week of work the only thing that I did which conceivably conflicted with their request was to state that I could not do one run of many runs that happened in one week, and take a 15 minute break .... So basically, I did everything they said. They gave me runs; I did them (Tr. 29-30).

The Act requires a refusal to drive in order to be protected activity. The only instance of protected activity that Schwartz alleges is his call to the dispatcher on July 5 stating that he would be too tired to drive two runs. Since he claims that he never refused to drive (because the runs were not offered to him), the only event that could be considered protected activity is when he called on July 5, 2000.

Refusing to drive can be protected activity when operation of the vehicle violates a federal regulation (STAA § 31105(a)(1)(B)(i)). In order to prove that he was engaged in protected activity under the so-called "when" clause of the STAA (when it would cause a violation), Schwartz must prove that operating the vehicle would, in fact, violate the specific requirements of a federal regulation. "To establish a violation of the ['when' clause] of the STAA, a complainant 'must show that the operation of a motor vehicle would have been a genuine violation of a federal safety regulation at the time he refused to drive – a mere good faith belief in a violation does not suffice.'" (Somerson v. Yellow Freight System, Inc., 1998-STA-9 and 11 (ALJ Feb. 18, 1999), citing Yellow Freight Systems v. Martin, 983 F. 2d 1195, 1199 (2d Cir. 1993)). Schwartz has not shown that operating the vehicle would have violated a federal safety regulation. Schwartz claims he would have violated the fatigue regulation, at 49 C.F.R. § 392.3, which states that,

> No driver shall operate a motor vehicle, and a motor carrier shall not require or permit a driver to operate a motor vehicle, while the driver's ability or alertness is so impaired, or so likely to become impaired, through fatigue, illness, or any other cause, as to make it unsafe for him to begin or continue to operate the motor vehicle.

To show that he would have violated this regulation, Schwartz must prove that his "'ability or alertness was so impaired as to make vehicle operation unsafe'" (Somerson at 14, citing Smith v. Specialized Transportation Services, 91-STA-22 (Sec'y, April 30, 1992), slip op. at 6). The question is whether a reasonable person

in the Complainant's position would think his ability and alertness were so affected. Cortes v. Lucky Stores, Inc., Case No. 96-STA-30, ARB Dec. Feb. 27, 1998, slip op. at 5. In Assistant Sec'y Porter v. Greyhound Bus Lines, 96-STA-23 (ARB June 12, 1998), the ARB upheld an arbitration ruling that the Respondent did not violate the provisions of STAA. The ARB said at page 3,

> Simply claiming that he was 'sleepy' when called by Greyhound ... is not enough to show that Complainant reasonably believed he was too fatigued to take the assignment. It is also not sufficient to show that an actual violation of the fatigue rule would have occurred if Complainant had accepted the assignment.

Schwartz has offered no evidence to establish that he would have violated a federal safety provision if he drove both shifts on July 5, 2000. The evidence is reduced to Schwartz' call to the day dispatcher claiming he would be too tired. He does not explain how he knew at 3:00 p.m. that he would be too fatigued at Midnight to complete a second run. Moreover, two runs were a prerequisite of the job and the other drivers were making two runs. The Complainant has not proven that he was engaged in protected activity under the "when" clause of the Act.

Refusing to drive can be protected activity when the refusal is because the employee has a reasonable apprehension of serious injury because of the unsafe condition of the vehicle (STAA § 31105(a)(1)(B)(ii)).

> An employee's apprehension of serious injury is reasonable only if a reasonable individual in the circumstances then confronting the employee would conclude that the unsafe condition establishes a real danger of accident, injury, or serious impairment to health. To qualify for protection, the employee must have sought from the employer, and been unable to obtain, correction of the unsafe condition.

There has been no allegation of the truck's unsafe condition.

A reasonable person in the same situation would need to conclude that there was a reasonable apprehension of serious injury if he drove. Somerson at 14, citing Byrd v. Consolidated Motor Freight, 98-ARB-64 (ARB May 5, 1998). The ARB went on to say in Somerson that the Complainant needed to do more than simply show that he was tired. Under the standard articulated in Byrd, "a driver's claim of fatigue, standing alone and without context, is insufficient for protection under the STAA to attach" (Id.). Instead, Courts are to examine the facts surrounding each claim to determine if a reasonable person in the Complainant's situation would have been justified in refusing to drive because of fatigue.

"The employee's refusal to drive must be based on an objectively reasonable belief that operation of the motor vehicle would pose a risk of serious injury to the employee or the public" (Yellow Freight Systems, Inc. v. Reich, 38 R.3d 76, 81 (2d Cir. 1994)). Schwartz has offered no evidence that his apprehension of injury was reasonable. The fact that all of Young's other drivers were making two runs by July 3 supports the notion that Schwartz' apprehension was, in fact, not reasonable (Tr. 48).

Schwartz makes a general claim about his inability to adjust his sleeping patterns before starting his job on June 29, 2000. He claims that he was not informed that he would be assigned to the night shift until June 28 (Tr. 26). It has been held, however, that it is reasonable for an employer to require an employee to shift his sleeping habits within a day's time. In Brandt v. United Parcel Service, 95-STA-26 (Sec'y Oct. 26, 1995), the Secretary said that, "it was not unreasonable for UPS to require a temporary feeder driver to shift his sleep pattern with 24 hours notice" Id. at 3. The Secretary found in Brandt that the complainant's failure to adjust his sleeping pattern was the reason for his termination. Here, Schwartz was apparently informed at least twenty-four hours in advance of his first assignment that he would be working the night shift. He was not supposed to report to duty until 6:00 p.m. on June 29, and he was informed of his night shift assignment on June 28, 2000. It is not unreasonable for Young's to require its seasonal tomato drivers to shift their sleeping patterns with twenty-four hours notice.

I find that the Complainant has not made a prima facie case and recommend that his complaint be dismissed.

RECOMMENDED ORDER

It is, therefore,

ORDERED that the complaint of Ronald N. Schwartz is hereby DISMISSED.

A

Robert L. Hillyard
Administrative Law Judge

NOTICE: This Recommended Decision and Order and the administrative file in this matter will be forwarded for review by the Administrative Review Board, U.S. Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, N.W., Washington, D.C., 20210. See 29 C.F.R. § 1978.109(a); 61 Fed. Reg. 19978 (1996).